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NO. _____

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

HERBERT W. TIMMS, dba PETROL EXPRESS, GAS-A-TRON OF ARIZONA; GAS-A-TRON CORPORATION; PETROL EXPRESS COOPERATIVE; PETROL STOPS, LTD - RIO LINDA and PETROL STOPS NORTHWEST, Petitioners

v.

THE UNITED STATES OF AMERICA, Respondent

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a contractual ambiguity may be resolved by the court in a summary judgment proceeding where there is more than one reasonable interpretation of the ambiguous language and where there is a dispute in the underlying facts.

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	10
CONCLUSION	18

APPENDICES

A. Opinion of the United States Court of Appeals for the Ninth Circuit

B. Order of the United States Court of Appeals for the Ninth Circuit denying Petition for Rehearing

C. Order of the United States District Court for the District of Arizona, July 31, 1980

TABLE OF AUTHORITIES

	Page
CASES	
Bear Brand Hosiery Co. v. Tights, Inc., 605 F.2d 723 (4th Cir. 1979)	15
Castaneda v. Dura-Vent Corp., 648 F.2d 612 (9th Cir. 1981)	9,10,13, 15,16
Champale, Inc. v. Joseph S. Pickett & Sons, Inc., 599 F.2d 857 (8th Cir. 1979)	15
Christopher v. Safeway Stores, Inc., 644 F.2d 467 (5th Cir. 1981)	15
Davis v. Chevy Chase Financial Ltd., 667 F.2d 160 (D.C. Cir. 1981)	13,15,17
Key v. Wise, ___ U.S. ___, 102 S. Ct. 682 (1981)	11
Lockwood v. Wolf Corp., 629 F.2d 603 (9th Cir. 1980)	16
Securities and Exchange Commission v. American Commodity Exchange, 546 F.2d 1361 (10th Cir. 1976)	17
Timms v. United States, 678 F.2d 831 (9th Cir. 1982)	8,9,14
Watt v. Alaska, 451 U.S. 259 (1981)	11

	Page
STATUTORY PROVISIONS	
28 U.S.C. §1254(1)	2
Section 530, Revenue Act of 1978, P.L. 95-600, as amended by P.L. 96-541	2,3,4, 5,6
OTHER AUTHORITIES	
Rule 17.1, U.S. Supreme Court Rules	11

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THE UNITED STATES OF AMERICA, Respondent

ON WRIT OF CERTIORARI TO
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Petitioners respectfully request this Court to issue its Writ of Certiorari to review the decision by the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit, Appendix A, infra, is reported at 678 F.2d 831.

The Order of the United States Court of Appeals for the Ninth Circuit denying the Petition for Rehearing, Appendix B, infra, is not reported. The Order of the United States District Court for the District of Arizona, dated July 31, 1980, Appendix C, infra, is reported at 80-2 U.S.T.C. ¶9614.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was filed on June 4, 1982. The Petition for Rehearing was denied by the Ninth Circuit on July 7, 1982. This Petition is timely filed within ninety days of that date. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

Section 530 of the Revenue Act of 1978, P.L. 95-600, as amended by P.L. 96-541, provides in pertinent part as follows:

"SEC. 530. CONTROVERSIES INVOLVING WHETHER INDIVIDUALS ARE EMPLOYEES FOR PURPOSES OF THE EMPLOYMENT TAXES.

(a) TERMINATION OF CERTAIN EMPLOYMENT TAX LIABILITY FOR PERIODS BEFORE JULY 1, 1982. --

(1) IN GENERAL. -- If --

(A) for purposes of employment taxes, the taxpayer did not treat an individual as an employee for any period ending before July 1, 1982, and

(B) in the case of periods after December 31, 1978, all Federal tax returns (including information returns) required to be filed by the taxpayer with respect to such individual for such period are filed on a basis consistent with the taxpayer's treatment of such individual as not being an employee,

then, for purposes of applying such taxes for such period with respect to the taxpayer, the individual shall be deemed not to be an employee unless the taxpayer had no reasonable basis for not treating such individual as an employee.

* * *

(4) REFUND OR CREDIT OF OVERPAYMENT. -- If refund or credit of any overpayment of an

employment tax resulting from the application of paragraph (1) is not barred on the date of the enactment of this Act by any law or rule of law, the period for filing a claim for refund or credit of such overpayment (to the extent attributable to the application of paragraph (1)) shall not expire before the date 1 year after the date of the enactment of this Act."[1]

* * *

STATEMENT OF THE CASE

On January 12, 1978, Petitioners entered into a compromise of a civil tax refund action which previously had been filed in the United States District Court for the District of Arizona. The subject matter of the compromise was the employment tax liability of Petitioners with respect to service station operators and area

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[1] Congress indefinitely extended Section 530 in the recently enacted Tax Equity and Fiscal Responsibility Act of 1982, P.L. 97-___, by removing the July 1, 1982, expiration dates. For all relevant periods in this case, however, the quoted language of the statute is applicable.

managers utilized in Petitioners' self-service gasoline stations. The other party to the compromise was the United States Department of Justice. Under the compromise, Petitioners agreed to pay additional employment taxes, interest and penalties for tax years 1970 through 1976 and agreed to treat their service station operators and area managers as employees for employment tax purposes for all periods after 1976. However, the compromise also provided that Petitioners would be relieved of their duty to comply with the employment tax requirements if there were a future change in the law. Finally, the compromise stated that Petitioners would be entitled to "appropriate refunds" if any such future change in the law were given retroactive effect.

On November 6, 1978, the President signed into law the Revenue Act of 1978. Section 530(a)(1) of the Act relieved a

taxpayer of his liability for employment taxes with respect to a category of workers if he had a reasonable basis for treating the workers as independent contractors and not as employees. Section 530(a)(4) provided for a refund of overpaid employment taxes.

Taking the position that Section 530 constituted the requisite retroactive change in law, Petitioners filed claims for refund of all amounts paid under the compromise. (Said amounts pertained to tax years 1970 through 1976.) When the Internal Revenue Service failed to allow the claims for refund, Petitioners filed suit in the United States District Court for the District of Arizona.

The case was presented to the district court on the basis of cross motions for summary judgment supported by a joint stipulation of facts. Both parties also

introduced affidavits containing conflicting interpretations of the refund provision of the compromise agreement. Petitioners' affiants stated that the refund provision was intended to apply to all tax periods. The government's affiant, however, stated that the refund provision was intended to apply only to periods after 1976.

In its Opinion, the district court held that "the government must be responsible for ambiguity added to the contract", Slip. Op., p. 4, Appendix C, infra, and, applying the rule contra proferentem, interpreted the refund provision to permit a refund of taxes paid for the period 1970 through 1976. The Ninth Circuit, however, held that the district court incorrectly applied the rule contra proferentem, stating that the district court erred in finding the government to be the drafting party of the

refund language. Timms v. United States, 678 F.2d 831, 834 (1982). The Ninth Circuit then proceeded to construe the refund provision, placing paramount importance on its location in the compromise agreement. Since the provision was located in a paragraph that pertained to periods after 1976, the court concluded that the refund provision was similarly limited to periods after 1976 and, therefore, reversed the decision in favor of Petitioners.[2]

In addressing the district court's application of the rule contra proferentem, the Ninth Circuit stated as follows in a footnote (id. p. 834, n. 2):

> "The contra proferentum rule is only invoked after a finding of ambiguity. See generally 4 S. Williston, A Treatise on the

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[2] Neither the District Court, nor the Court of Appeals, in their written opinions, commented on the conflicting affidavits.

> Law of Contracts, § 608 (3d ed. 1961). Here it is unclear whether the district court found the relevant language ambiguous. We assume for purposes of this part of our discussion that such was the finding, although we conclude infra, that reversal is required whether or not the provision at issue is considered ambiguous."

In their Petition for Rehearing before the Ninth Circuit, Petitioners pointed out that the assumption that reversal was required "whether or not the provision at issue is considered ambiguous" was inconsistent with other decisions of the Ninth Circuit, which had held (in line with the view adopted by the other circuits) that contractual ambiguities are to be resolved by the trier of fact and not by the court on motions for summary judgment. See, e.g., Castaneda v. Dura-Vent Corp., 648 F.2d 612, 619-20 (9th Cir. 1981):

> "In contract cases, summary judgment is appropriate only if the contract or the contract provision in question is unambiguous. . . . A contract or

> a provision of a contract is ambiguous if it is reasonably susceptible of more than one construction or interpretation."

The Ninth Circuit denied the Petition for Rehearing, but in its order of denial amended its opinion by removing the last sentence of footnote 2. See Order, Appendix B, infra. Accordingly, after this amendment footnote 2 of the opinion read as follows:

> "The contra proferentum rule is only invoked after a finding of ambiguity. See, generally, 4 S. Williston, A Treatise on the Law of Contracts § 608 (3d ed. 1961). Here it is unclear whether the district court found the relevant language ambiguous."

REASONS FOR GRANTING THE WRIT

This case does not fall into one of the categories typically qualifying for Supreme Court review on a petition for writ of certiorari. There is no obvious conflict between the decision of the Ninth Circuit (as amended) and that of another circuit; and the Ninth Circuit did not

depart so far "from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Rule 17.1(a), U.S. Supreme Court Rules. Cf., Key v. Wise, ___ U.S. ___, 102 S. Ct. 682, 683 (1981) (Brennan, J., dissenting). Petitioners also realize that "this Court does not sit primarily to correct what [it] perceive[s] to be mistakes committed by other tribunals", Watt v. Alaska, 451 U.S. 259, 275 (1981) (Stevens, J., concurring), and thus the mere erroneous application of an established rule of contract law in a Federal case would generally not constitute a sufficient reason for this Court to accept the case for review. Indeed, in this case it is even difficult to accuse the Ninth Circuit of misapplying a rule of contract law since it is not clear which rule or rules were applied by the court in

reaching its decision. (This will become evident later in this Petition.)

Because of the confusion engendered by the Ninth Circuit's opinion and amendment of opinion, however, Petitioners submit that this case is appropriate for review by this Court in order to reestablish certain basic principles of contract law that would otherwise be left in doubt.

The confusion arose as follows: Petitioners' claim for tax refund was predicated on the refund provision of the compromise agreement between Petitioners and the government. Petitioners construed the provision to permit a refund of all amounts paid under the compromise agreement. The government contended that the refund provision was limited to amounts paid with respect to tax periods after 1976. In a summary judgment proceeding, the district court accepted the Petitioners' interpretation, holding that

the government should be responsible for any ambiguity added to the agreement. The Ninth Circuit reversed, accepting the government's narrower construction of the refund provision. In view of the different interpretations given the provision, however, the appellate court should have held that the provision was ambiguous, thus making summary judgment improper. See Castaneda, supra, at 619-20; see, also, Davis v. Chevy Chase Financial Ltd., 667 F.2d 160, 169 (D.C. Cir. 1981):

> "Where contractual language is susceptible of at least two fairly reasonable interpretations, this presents a triable issue of fact, and summary judgment would be improper."

Rather than remanding the case for trial, the Ninth Circuit looked to the four corners of the contract and found that, when read in context, the disputed provision limited refunds in the manner favored by the government. The Court did

not resolve the issue of contract ambiguity, merely noting that it was "unclear whether the district court found the relevant language ambiguous". See Order, Appendix B, infra.

Without an express holding from the Ninth Circuit on the question of ambiguity, we are left with the possibility of three different interpretations of the opinion. First, the Ninth Circuit may have determined that there was no ambiguity in the refund provision. Second, the Ninth Circuit may have determined that a contractual ambiguity may be resolved in a summary judgment proceeding despite a dispute in the underlying facts.[3] Third, the Ninth Circuit may have determined that there

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[3] In view of the Ninth Circuit's elimination of the language in its earlier opinion that reversal is required "whether or not the provision at issue is considered ambiguous", Timms, supra, 678 F.2d at 834, n. 2, this is the least likely interpretation.

was no dispute in the underlying facts and that it was, therefore, entitled to resolve the ambiguity in a summary judgment proceeding.

Each holding would be erroneous. The first holding would be in error because there were two reasonable interpretations of the refund provision; thus it cannot be said to be unambiguous. Castaneda, supra; Davis, supra. The second holding would be in conflict with the rule adopted by all circuits, including the Ninth Circuit, which have addressed the issue of contractual ambiguity; to-wit, a contractual ambiguity may not be resolved in a summary judgment proceeding where there is a dispute in the underlying facts. See, e.g., Davis, supra (D.C. Cir.); Bear Brand Hosiery Co. v. Tights, Inc., 605 F.2d 723, 726 (4th Cir. 1979); Christopher v. Safeway Stores, Inc., 644 F.2d 467, 471 (5th Cir. 1981); Champale, Inc. v. Joseph S. Pickett

& Sons, Inc., 599 F.2d 857, 859 (8th Cir. 1979); Castaneda, supra (9th Cir.). The third holding would be in error because there was a dispute in the underlying facts; although the case was submitted on the basis of a joint stipulation of facts, each party introduced affidavits which contained conflicting interpretations of the refund provision. Cf., Lockwood v. Wolf Corp., 629 F.2d 603 (9th Cir. 1980), applying the principle (not applicable here) that a contractual ambiguity may be resolved by a court in the absence of an underlying factual dispute.

In summary, the matter should not have been submitted to the trial court on the basis of cross motions for summary judgment. It should have been submitted to the trier of fact. The district court erroneously granted Petitioners' motion for summary judgment. The Ninth Circuit erroneously awarded summary judgment in

favor of the government and compounded that error by issuing an opinion that invites misinterpretation and confusion on the matter of contractual ambiguity.[4]

Accordingly, this Court should accept review in order to reestablish the principle that contractual ambiguities should not be resolved in a summary judgment proceeding.

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[4] The fact that Petitioners moved for summary judgment below does not estop them from now contending that there was a genuine issue of material fact and that summary judgment was thus improper. See Securities and Exchange Commission v. American Commodity Exchange, 546 F.2d 1361, 1365 (10th Cir. 1976); Davis, supra, 667 F.2d at 170.

CONCLUSION

For the above reasons, it is respectfully requested that this Court grant certiorari and review the opinion below.

October 5, 1982.

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